EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

COMMISSIONER OF INTERNAL REVENUE
86–1053 v.
ASPHALT PRODUCTS CO., INC.

ASPHALT PRODUCTS CO., INC.
86–1054 v.
COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 86–1053 AND 86–1054. Decided June 1, 1987

JUSTICE MARSHALL, concurring in part and dissenting in part.

Once again the Court decides a case summarily without benefit of full briefing on the merits of the question decided. As I noted recently, *Montana* v. *Hall*, —— U. S. ——, —— (1987) (MARSHALL, J., dissenting from summary disposition), the Supreme Court Rules governing the filing of petitions for certiorari instruct the parties to address whether plenary consideration of the case would be appropriate, and do not encourage detailed discussions of the merits. In this case, adhering to the admonition in Supreme Court Rule 22.2 that a response be "as short as possible," respondent filed a nine-page brief in opposition to the petition for certiorari, of which only *four pages* dealt with the issue of the proper construction of § 6653(a)(1). It is, in my view, unfair to decide a case such as this without first permitting the litigants to brief in full the merits of the issues decided.

The wisdom of summary disposition of this case is particularly doubtful. The legislative history of the Tax Reform Act of 1986, not mentioned by the Court, indicates that Congress considered carefully the scheme for imposing negligence penalties, see H. R. Conf. Rep. No. 99–841, at pp. II–779-II–782 (1986), and expressly disapproved the deci-

sion of the Court of Appeals in this case. *Id.*, at II-782 n. 3. Because Congress has definitively stated that the decision below is not to be followed in cases arising under the 1986 Act, this case, if left undisturbed, would have negligible precedential value. Moreover, courts considering the issue even with regard to tax years before 1987, while not bound by the current Congress' view of the intent of a previous Congress, would probably pay some heed to the congressional view of the proper reading of § 6653(a)(1).*

Under the circumstances it appears the reason for summarily reversing the judgment of the Court of Appeals in this case is simply that the majority perceives it to be wrong. But this Court routinely denies petitions for certiorari seeking review of decisions that, on the face of the petitions or the petitions and responses, appear to be wrong. I can discern no intelligible principle distinguishing from that large number of cases those the Court chooses to decide without first giving the parties the opportunity to brief the merits of the case in full, and giving itself the opportunity to ensure that its initial impression is borne out by more thoughtful consideration. That our jurisdiction is discretionary should not lead us to be arbitrary in its exercise.

I would not decide this case without first giving the parties the opportunity to file briefs on the merits. Accordingly, I dissent from the Court's summary disposition in No. 86–1053. Because I too would deny the petition for certiorari in No. 86–1054, I concur in that part of the Court's *per curiam* opinion.

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*Indeed, petitioner relies on this legislative history to support its contention that the decision of the Court of Appeals in this case was erroneous, Pet. for Cert. 6–8, and suggests that the Court vacate and remand the decision below for further consideration in light of the Conference Report. *Id.*, at 8 n. 4.